TESTIMONY OF ATTORNEY GENERAL FREY ON L.D. 2094, "AN ACT TO IMPLEMENT THE RECOMMENDATIONS OF THE TASK FORCE ON CHANGES TO THE MAINE INDIAN CLAIMS SETTLEMENT IMPLEMENTING ACT"

FEBRUARY 14, 2020

Introduction

Senator Carpenter, Representative Bailey, and members of the Joint Standing Committee on Judiciary, thank you for allowing me this opportunity to comment on L.D. 2094, "An Act to Implement the Recommendations of the Task Force on Changes to the Maine Indian Claims Settlement Implementing Act." This bill proposes to significantly alter the jurisdictional relationship between the State of Maine and the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians (collectively, the "Tribes"). The present jurisdictional relationship is the result of a compromise reached in 1980 to settle tribal land claims. The settlement is memorialized in two statutes – the state Maine Implementing Act ("MIA"), 30 M.R.S. §§ 6201-6214, and the federal Maine Indian Claims Settlement Act ("MICSA"), Pub. Law 96-420. L.D. 2094 makes substantial changes to MIA.

Ultimately, whether to amend MIA and alter the jurisdictional relationship between Maine and the Tribes is a policy matter for the Legislature to consider. I note, though, that some aspects of the proposed changes may require approval by Congress. In providing this testimony, my goal is simply to provide the Legislature with a basic legal analysis to help inform its decision. At the outset, I want to qualify the below analysis by pointing out that my office has had less than two weeks to review L.D. 2094. MIA and MICSA, on the other hand, were developed after months – if not years – of discussion, vetting, and legal review by, among others, lawyers for the State, the Tribes, and the Department of the Interior. While we have done our best to review and analyze L.D. 2094, the time constraint we were working under, combined

with the many fundamental changes L.D. 2094 makes to MIA, make it possible that we have not addressed important issues and consequences and that L.D. 2094 may have legal effects beyond those identified below.

Finally, it is important to note that while often the Legislature can modify legislation in future years when it is not working as intended or is resulting in unintended consequences, the Legislature's authority to amend MIA is limited. Amendments to MIA require consent by the affected Tribes, or, potentially, consent by Congress. So, any amendments to MIA the Legislature makes now may remain for many years to come, even if the amendments ultimately do not operate as intended by all parties.

Incorporation of Federal Indian Law

I understand that one goal of amending MIA is to reduce litigation between the State and the Tribes. As an initial matter, it is noteworthy that in the 40-year history of MIA and MICSA, there has been relatively little litigation between the States and the Tribes. It is likely that proposed amendments in L.D. 2094 would result in significantly more litigation. The bill essentially incorporates wholesale into Maine "federal Indian law." *See, e.g.,* L.D. 2094, § 2 ("Except as otherwise specified in this chapter, federal Indian law applies with regard to the rights, privileges, powers, duties and immunities of the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians."). While the bill purports to define "federal Indian law," the definition is, necessarily, very broad: "'Federal Indian law' means the United States Constitution and all federal statutes, regulations and case law and subsequent amendments thereto or judicial interpretations thereof, relating to the rights, privileges, powers, duties and immunities of federally recognized Indian tribes within the United States, except those federally

recognized Indian tribes subject to United States Public Law 83-280 or a specific treaty or settlement act." L.D. 2094, §3.

As this definition suggests, "federal Indian law" is complex, evolving and subject to judicial interpretation. One well-respected treatise in this area is *Cohen's Handbook of Federal Indian Law*, and the most recent edition is in excess of 1,450 pages. Throughout the country, there is frequent litigation over the respective rights and obligations of tribes, states, and the federal government regarding the application of federal Indian law to specific jurisdictional disputes. MIA and MICSA sought to avoid such litigation by expressly defining the limits of the State's and each Tribe's jurisdiction and authority. There has been some litigation over the meaning of certain MIA and MICSA provisions, but there would likely be far more litigation if the model of expressly defining jurisdictional limits is jettisoned in favor of incorporating evolving concepts of federal Indian law.

Tribal Lands

L.D. 2094 will authorize the Tribes to exercise jurisdiction over the entirety of their "tribal lands," and Maine law will be largely inapplicable on such lands. "Tribal lands" is defined as the land held in trust for the Tribe by the Secretary of the Interior along with any reservation land held by the Tribe. L.D. 2094, §3.[1] It includes not just land held in trust at the time the bill is enacted, but also all lands the Secretary takes into trust in the future. There is no geographic restriction, so land anywhere in the State is potentially eligible for becoming tribal lands so long as the Secretary takes the land into trust. Unlike existing MIA provisions, L.D.

[1] "Tribal lands" is a new term – it is not found in either MIA or MICSA.

2094 does not require local governmental approval before land within a city, town, or village is taken into trust.[2]

There is a question regarding the extent to which the Secretary would have legal authority to take land into trust if L.D. 2094 were enacted. "Land not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust status when such acquisition is authorized by an act of Congress." 25 C.F.R. § 151.3. With respect to the Passamaquoddy Tribe and the Penobscot Nation, MICSA authorizes the Secretary to take up to 150,000 acres per Tribe into trust within certain specified areas and states: "Land or natural resources acquired outside the boundaries of the aforesaid areas shall be held in fee by the respective tribe or nation, and the United States shall have no further trust responsibility with respect thereto." Pub. Law. 96-420, § 5(d).[3] MICSA also states: "Except for the provisions of this Act, the United States shall have no other authority to acquire lands or natural resources in trust for the benefit of Indians or Indian nations, or tribes, or tribes, or bands of Indians in the State of Maine. *Id.*, § 5(e). Based on these provisions of MICSA, the Secretary may not have legal authority to take into trust land located outside of the MICSA-specified areas.[4]

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[2] It is our understanding that in deciding whether to take land located outside of a reservation into trust, the Secretary will consider, among other factors, 1) the "distance between the tribe's reservation and the land to be acquired," with the "Secretary giv[ing] greater scrutiny to the tribe's justification of anticipated benefits from the acquisition" as the distance between the reservation and the land increases; 2) the tribe's anticipated economic benefits (when land is being acquired for business purposes); and 3) any comments from the state or local government having regulatory jurisdiction over the land. *See* 25 C.F.R. §§ 151.11(b), (c) and (d).

[3] MICSA authorizes the Secretary to take land into trust on behalf of the Houlton Band of Maliseet Indians after "enactment of appropriate legislation by the State of Maine approving such acquisition." Pub. L. 96-420, § 5(d). Maine subsequently passed such legislation. Me. Pub. Law 1981, ch. 675. L.D. 2094 makes amendments to that legislation, and it not clear what effect, if any, the Secretary would give these amendments.

[4] Even within the specified areas, it is not clear whether the Secretary would have authority to take "tribal lands" into trust. MICSA authorizes the Secretary to take into trust land that is eligible for inclusion within Penobscot Indian Territory and Passamaquoddy Indian Territory. Pub. L. 96-420, § 5(d). L.D. 2094 eliminates all references to Indian Territory and instead creates the category of "tribal lands," which MICSA does not authorize to be taken into trust.

Reserved Treaty Rights

L.D. 2094 creates an ambiguity over the extent to which the Tribes would have rights set forth in various treaties from the 18th and early 19th centuries. MICSA discharged the State from all treaty obligations:

> Except as expressly provided herein, this Act shall constitute a general discharge and release of all obligations of the State of Maine and all of its political subdivisions, agencies, departments, and all of the officers or employees thereof arising from any treaty or agreement with, or on behalf of any Indian nation, or tribe or band of Indians or the United States as trustee therefor, including those actions now pending in the United States District Court for the District of Maine captioned United States of America against State of Maine (Civil Action Nos. 1966–ND and 1969–ND).

Public Law 96-420, § 12; *see also id.*, § 2(b)(3) ("It is the purpose of this Act . . . to ratify the Maine Implementing Act, which defines the relationship between the State of Maine and the Passamaquoddy Tribe, and the Penobscot Nation").

L.D. 2094 proposes to add the following to MIA's statement of legislative findings and declaration of policy:

> The resolution reached among the Indian claimants and the State affirmed the land transfers and the reservations of rights embodied within the specific treaties that gave rise to the claims at issue, and sought to definitively eliminate any prospect that the claims brought by the Indian claimants would cloud private title to land in the State.

It is not clear how this language can be squared with MICSA, and, at the very least, it creates an ambiguity regarding the extent of the Tribes' reserved treaty rights. The State does not have the authority to reinstate treaty rights that have been terminated by Congress.

Fishing and Hunting

Under existing law, the Passamaquoddy Tribe and the Penobscot Nation have exclusive authority to promulgate hunting and fishing ordinances within their respective territories. 30 M.R.S. § 6207(1). Subject to a sustenance fishing exception, "[s]uch ordinances shall be equally

applicable, on a nondiscriminatory basis, to all persons regardless of whether such person is a member of the respective tribe or nation." *Id.* The Commissioner of Inland Fisheries and Wildlife ("IF&W") has certain supervisory authority to address potential depletion of fish or wildlife stocks. *Id.*, § 6207(6). Under existing law, the Houlton Band of Maliseet Indians has no regulatory authority over hunting and fishing.

L.D. 2094 authorizes the Tribes to regulate fishing and hunting on all tribal lands.[5] It removes the requirement that tribal ordinances be equally applicable to tribal and nontribal members and eliminates the Commissioner's supervisory authority. L.D. 2094 retains the authority of the Maine Indian Tribal-State Commission to adopt fishing regulations for certain waterbodies.

One provision of L.D. 2094 states: "Solely for conservation purposes, the State has jurisdiction with respect to the regulation of fishing and hunting by Indians off tribal lands to the extent permitted under federal Indian law and in a manner consistent with reserved tribal treaty rights." L.D. 2094, § 10. The intent of this provision is not clear. Elsewhere in the country, states generally are not limited to advancing conservation purposes when regulating the fishing and hunting by Indians off tribal lands. Off tribal lands, such activity is generally fully subject to state regulation. There may be an exception when a tribe has a reserved treaty right that gives its members certain rights with respect to fishing or hunting in areas outside of tribal lands. It is not clear whether the Tribes here claim to have such reserved treaty rights, and, as discussed above, MICSA discharged the State from all treaty obligations. Clarification regarding the intent of this provision (and the nature of any claimed treaty rights that have not been extinguished by Congress) is necessary.

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[5] This authority would extend to the regulation of fishing on Great Ponds, which are currently regulated exclusively by the State.

Presently, members of the Passamaquoddy Tribe and the Penobscot Nation may take fish within the boundaries of their reservations for their individual sustenance, subject to supervision by the IF&W Commissioner to protect against significant depletion of fish stocks. 30 M.R.S. § 6207(4). L.D. 2094 would extend sustenance fishing to the Houlton Band of Maliseet Indians and, for all three Tribes, would expand it to all tribal lands. It would also remove the Commissioner's supervisory authority. L.D. 2094, §10.

Finally, several existing state statutes address fishing and hunting by tribal members off tribal lands. *See, e.g.,* 12 M.R.S. § 6302-A (regulating the taking of marine organisms by tribes and tribal members, including the issuance of commercial fishing licenses by the tribe); 12 M.R.S. § 6302-B (regulating the annual elver fishery quota allocation for tribes and tribal members); 12 M.R.S. §§ 11006(2) &11162(3) (exempting tribal members from archery and crossbow hunter education requirements). It is not clear to what extent these statutes would or should continue to have any effect in light of L.D. 2094.

Land Use and Natural Resources

L.D. 2094 would give the Tribes exclusive authority to regulate tribal lands and natural resources within those lands (and, potentially, natural resources outside of tribal lands). First, the bill repeals 30 M.R.S. § 6204, which states:

> Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.

Second, the bill declares:

> The State recognizes the rights of the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians to exercise regulation of natural

resources and land use on their respective tribal lands to the extent provided in federal Indian law.

L.D. 2094, § 11. For all land deemed "tribal lands" (i.e., tribal reservations plus all land now held in trust by the Secretary of the Interior or taken into trust in the future), the Tribes would exclusively regulate the use of the land. The State would likely have no authority to enforce its permitting, siting, land use, or environmental protection laws.

The bill potentially would allow the Tribes to effectively regulate natural resources outside their tribal lands. Congress has authorized Indian tribes to assume primary regulatory authority for administering federal environmental programs on Indian lands. This is generally done through "treatment as state" provisions, which authorize federal agencies to treat Indian tribes as states for purposes of implementing federal environmental programs. *See, e,g,,* 33 U.S.C. § 1377(e) (under the Clean Water Act, EPA "authorized to treat an Indian tribe as a State"); 42 U.S.C. § 7601(d)(1)(A) (under the Clean Air Act, EPA "authorized to treat Indian tribes as States"); 42 U.S.C. § 9626(a) (under the Comprehensive Environmental Response, Compensation and Liability Act, the "governing body of an Indian tribe shall be afforded substantially the same treatment as a State"). In the Clean Water Act context, federal courts have held that dischargers upstream from a tribe (and not within tribal land) may be required to comply with the tribe's water quality standards. *See City of Albuquerque v. Browner,* 97 F.3d 415 (9th Cir. 1996) (holding that EPA had authority to require upstream dischargers to comply with downstream tribal standards); *Wisconsin v. E.P.A.*, 266 F.3d 741 (7th Cir. 2001) (same).[6]

[6] Generally speaking, "treatment as state" provisions and other federal laws enacted for the benefit of Indian tribes that would affect or preempt the application of Maine law do not apply in Maine. Pub. Law 96-420, §§ 6(h), 16(b). As will be discussed, L.D. 2094 purports to make such laws applicable in Maine.

Gaming

L.D. 2094 would permit the Tribes to conduct gaming activities on all tribal lands. A federal law – the Indian Gaming Regulatory Act ("IGRA"), 18 U.S.C. §§ 1166–1168 – imposes certain restrictions on Indian gaming. The First Circuit has held, though, that IGRA does not apply in Maine. *Passamaquoddy Tribe v. State of Maine*, 75 F.3d 784 (1st Cir. 1996). The basis for the First Circuit's holding was Section 16(b) of MICSA, which, as will be discussed, limits the application in Maine of federal Indian law that affects or preempts Maine law. While L.D. 2094 purports to undo the effect of Section 16(b) by "deeming" that no federal Indian law that affects or preempts Maine law, this may not be effective, as discussed below. In that case, IGRA, and the restrictions it imposes on tribal gaming, may not apply.

Taxation

Under current law, the Tribes are required to make payments in lieu of taxes on real and personal property within their territories in an amount equal to what would otherwise be imposed by the relevant taxing authority. 30 M.R.S. § 6208. Property used predominantly for tribal government purposes is exempt. *Id.* Otherwise, "[t]he Passamaquoddy Tribe, the Penobscot Nation, the members thereof, and any other Indian, Indian Nation, or tribe or band of Indians shall be liable for payment of all other taxes and fees to the same extent as any other person or entity in the State." *Id.*

L.D. 2094 would repeal the "payment in lieu" of taxes provision. Tribal lands would not be subject to state and local real property taxes. L.D. 2094, § 12. The bill also states that "the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians, their tribal members and their tribal entities are not subject to state or local sales taxation on tribal lands." *Id.* Tribal members who live on the tribal lands of their respective tribes would not be subject to

state income tax on income earned on those lands. *Id.* Finally, the State and the Tribes would have "concurrent jurisdiction" to tax nontribal members for activity occurring on tribal lands. *Id.*

It is not clear the extent to which nontribal members or business entities owned by non-tribal members,[7] when engaged in activities on tribal lands, would be subject to state and local taxes. For example, while tribal members would presumably not pay state sales taxes[8] on purchases made on tribal lands, whether nontribal members would do so is not certain.[9] The bill states: "The State recognizes and adopts federal Indian law providing for concurrent jurisdiction for the State, local governments, and the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians to tax nontribal citizens on Passamaquoddy Tribal Lands, Penobscot Tribal Lands or Houlton Band Tribal Lands." L.D. 2094, § 12. Unfortunately, federal Indian law in this area is complex and there are no bright-line rules. The Supreme Court has stated:

> When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144-45 (1980) (citations omitted).

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[7] L.D. 2094 describes the concurrent jurisdiction to tax as over "nontribal citizens," but that phrase is not defined and may not include state-chartered business entities.

[8] Taxes such as those on gasoline and cigarettes are also implicated.

[9] Sales taxes are just one example of a tax that nonmembers might be exempted from paying if it is based on the nonmembers' activities on tribal lands. Other taxes include property taxes, corporate income taxes, business taxes, vehicle and equipment taxes, service provider taxes, and health care provider taxes.

Courts engage in a fact-specific analysis and consider different factors, and it is difficult to predict the outcome of any specific case.

Adding to the uncertainty regarding the extent to which nonmembers will be subject to state and local taxes is the provision in the bill stating that the Tribes "have exclusive authority to exercise civil legislative jurisdiction within their respective tribal lands over members of any federally recognized Indian tribe, nation or band or other group as well as any person who is not a member of any federally recognized Indian tribe, nation, band or other group." L.D. 2094, § 23. If the Tribes have exclusive legislative jurisdiction over nonmembers, they could potentially exempt the application of state tax laws (and any other law) to the activities of nonmembers on tribal lands.

Even if nonmembers are subject to state and local taxes, consideration should be given to how the State and local governments would collect them. The Task Force report

> [r]ecognize[s] that state and local efforts to compel Tribal entities to collect and remit state and local taxes on nonmembers create conflict between states and Tribes, prevent Tribes from imposing Tribal taxes on nonmembers at Tribal entities, and impair Tribes' ability to generate tax revenue to provide government services to members and nonmembers in their communities.

Task Force Report, at 49. On the other hand, if a state is foreclosed from collecting taxes on nonmember activity (or if nonmembers are simply exempt from taxes), it impacts the state's revenues and can potentially put businesses not located on tribal lands at a competitive disadvantage. Clarification of the operation of tax laws on nonmembers, and of the manner in which such taxes can be collected, would be helpful.

Criminal Jurisdiction

Under present law, the Penobscot Nation and Passamaquoddy Tribe tribal courts[10] have exclusive criminal jurisdiction over Class D and E crimes committed on each Tribe's reservation by a member of any federally recognized Indian tribe, except when committed against the person or property of a non-Indian.[11] 30 M.R.S. §§ 6209-A(1)(A), 6209-B(1)(A). The two Tribes also have exclusive jurisdiction over juvenile offenses committed on reservation if that crime would be within the jurisdiction of the Tribe if committed by an adult. 30 M.R.S. §§ 6209-A(1)(B), 6209-B(1)(B). The definitions of crimes, juvenile offenses, and their applicable punishments are defined in State law, but the procedure of the tribal courts is governed by federal statute, including the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301-03. The Tribes do not have the authority to prosecute any of the following: 1) felony-level offenses (Class A, B, or C crimes), 2) crimes and juvenile offenses committed by tribal members against non-tribal members, or 3) crimes or juvenile offenses committed by non-Indians.

Currently, Penobscot and Passamaquoddy Tribal law enforcement officers have exclusive authority to enforce on their respective reservations the criminal laws within the exclusive jurisdiction of each Tribe's respective tribal court. 30 M.R.S. § 6210(1). Tribal law enforcement

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[10] Although authorized by section 6209-C to exercise criminal jurisdiction similar to that of the other two Tribes, the Houlton Band of Maliseets does not yet have an operational tribal court. All the proposed changes in L.D. 2094 would apply to the tribal courts of the Penobscot Nation, the Passamaquoddy Tribe and the Houlton Band.

[11] Currently, sections 6209-A, 6209-B, and 6209-C contain different language regarding the identity of the tribal defendant and tribal victim. *Compare* 30 M.R.S. § 6209-B(1)(A) *with* 30 M.R.S. §§ 6209-A(1)(A), 6209-C(1)(A) & 6209-C(1-A)(A). It makes sense to simplify these distinctions and define the exclusive jurisdiction of tribal courts by reference to offenses committed by a member of a federally recognized Indian tribe, except when committed against the person or property of a non-Indian.

officers have joint authority with State and county law enforcement officers to enforce all other State criminal laws in Indian territory. 30 M.R.S. § 6210(2).[12]

L.D. 2094 expands the criminal jurisdiction of the Tribes in several ways. First, it expands the Tribes' exclusive criminal jurisdiction from just Class D and E offenses to felony-level offenses (those punishable by more than one year) committed by a member of a federally recognized Indian tribe, except when committed against the person or property of a non-Indian. L.D. 2094, § 14. The bill would also expand the Tribes' exclusive jurisdiction to juvenile offenses that would be within the Tribes' exclusive jurisdiction if committed by an adult.[13] The jurisdiction over felony-level offenses encompasses those crimes punishable by more than a year under state or federal law or when the defendant has been previously convicted of a comparable offense within any jurisdiction of the United States. The Tribes' jurisdiction over felony-level offenses provided in L.D. 2094 is tied to the sentence imposed—up to three years or $15,000, provided that additional due process protections of 25 U.S.C. § 1302(c) are provided to the Indian defendant.[14]

Second, the bill allows the Tribes to exercise concurrent jurisdiction with the State over the crimes and juvenile offenses within their expanded exclusive jurisdiction when the defendant is a tribal member, but the victim is not a tribal member.[15] Third, the bill allows the Tribes to

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[12] The Houlton Band of Maliseets is authorized to "appoint law enforcement officers who have the authority to enforce all the laws of the State within the Houlton Band Trust Land." 30 M.R.S. § 6206-B(1).

[13] The bill also contemplates that tribes will have the authority to define additional juvenile offenses that do not have an adult crime corollary and have exclusive jurisdiction over those offenses if the juvenile is a member of a federally recognized Indian tribe (unless the victim is the person or property of a non-Indian).

[14] It is unusual to define a court's jurisdiction by the sentence imposed at the end of a proceeding, instead of the potential term of imprisonment. A criminal defendant would be unable to challenge the tribal court's jurisdiction until he or she is already sentenced.

[15] Criminal offenses where there is no victim (such as OUI) would be within the Tribes' exclusive jurisdiction.

define the criminal and juvenile offenses and applicable punishments that are within their exclusive and concurrent jurisdiction, rather than utilizing the State's definitions of crimes, juvenile offenses, and their punishments. Fourth, the bill increases the geographic scope of each tribal court's jurisdiction to include offenses committed on tribal lands (wherever situated now or in the future), instead of just offenses committed on a reservation.

The State retains exclusive jurisdiction over all crimes committed by non-Indians on tribal lands, regardless of the status of the victim, and for all victimless crimes committed by non-Indians. The State would also have concurrent jurisdiction with the Tribes over crimes committed by a tribal member on tribal lands against the person or property of a non-Indian victim, but State law would govern the definitions of those criminal offenses.

L.D. 2094 maintains the existing division of law enforcement authority between the State and the Tribes but expands the geographic scope of the Tribes' exclusive law enforcement authority to all tribal lands. Unless cooperation agreements are entered into with the Tribes, State and county law enforcement officers would have no authority to enforce tribal laws over which the tribal courts have exclusive jurisdiction. L.D. 2094, § 18.

Although L.D. 2094 allows tribes to define the crimes and applicable punishments that are within their exclusive and concurrent jurisdiction, it is unclear what crimes would be included. Current State law classifies crimes based on the *potential* term of imprisonment; L.D. 2094 defines the Tribes' jurisdiction based on the *actual* sentence imposed and caps the potential sentence for any one offense at three years or $15,000. The Tribes would be permitted to adopt complete criminal codes, but they may not be able to ensure appropriate sentences for serious offenses and offenders.

This is so because two federal statutes that address criminal jurisdiction in Indian country elsewhere do not apply in Maine: the General Crimes Act and the Major Crimes Act. Pub. Law. 96-420, § 6(c). Elsewhere, the Major Crimes Act vests exclusive jurisdiction over murder, manslaughter, kidnapping, maiming, and several other major crimes committed by an Indian in Indian country in the federal courts. 18 U.S.C. § 1153(a). Because the Major Crimes Act does not apply in Maine, the Tribes would have either concurrent or exclusive jurisdiction over the major crimes identified in that federal law committed by an Indian on tribal lands. Thus, L.D. 2094 seemingly would allow the Tribes to criminalize manslaughter in tribal law, prosecute an Indian defendant for manslaughter in tribal court, but only impose a three-year maximum sentence. Clarity over what crimes would be within the Tribes' exclusive or concurrent jurisdiction is needed in order to promote public safety and ensure appropriate sentences for serious offenders.

Further, although Indian defendants prosecuted for felony-level offenses are entitled to the basic rights and due process protections within ICRA and the additional due process protections in section 1302(c) of ICRA, those rights are not coextensive with the Federal and Maine Constitutions. *See United States v. Bryant*, 136 S. Ct. 1954, 1962 (2016). For example, although ICRA contains comparable language to the Fourth and Fifth Amendments, *see* 25 U.S.C. § 1302(a)(2), (3), tribal courts may not be required to follow or apply Supreme Court cases rules and cases interpreting those rights, such as *Miranda v. Arizona*, 384 U.S. 436 (1966) (*Miranda* warnings), and *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule). Also, there is both a federal and Maine constitutional right to a grand jury, but there is no grand jury right under ICRA

L.D. 2094 would also allow both the State and a Tribe to prosecute an Indian defendant for the same conduct if that conduct constituted a criminal offense within both sovereigns' concurrent jurisdiction. Under the current system, an individual generally is not subject to two prosecutions. *But see State v. Mitchell*, 1998 ME 128, 712 A.2d 1033 (misdemeanor prosecution in tribal court did not bar felony prosecution in state court for same conduct).

L.D. 2094 expands to all tribal lands the tribal courts' exclusive and concurrent jurisdiction and tribal law enforcement officers' exclusive authority to enforce tribal law within that exclusive and concurrent jurisdiction. In some cases, trust lands are hundreds of miles away from the tribal court and tribal law enforcement officers. Without a cooperative aid agreement, the bill could hamper law enforcement responses to emergency situations.

Finally, the Legislature should take this opportunity to ensure that criminal history record information from tribal courts is shared with the State and recorded in the Maine criminal history database. Criminal history record information is used for purposes such as sex offender registrations, firearms prohibitions, bail determinations, risk assessment in domestic violence cases, and sentencing enhancement. Expansion of criminal jurisdiction without assurances that tribal courts will be part of the State's criminal history database would be detrimental to public safety.

Civil Legislative Jurisdiction

The bill would give the tribes "exclusive authority to exercise civil legislative jurisdiction within their respective tribal lands over members of any federally recognized Indian tribe, nation, band or other group as well as any person who is not a member of any federally recognized Indian tribe, nation, band or other group." L.D. 2094, § 23. "Legislative jurisdiction" refers to a Tribe's authority to regulate or tax persons and property within its tribal lands. This authority

could include any civil law, from the professional regulation and licensing of doctors and nurses practicing on tribal lands, to the creation of a corporate code. The bill confers extremely broad authority on the tribes by authorizing legislative jurisdiction not just over tribal members and members of other federally recognized tribes, but also over persons who are not members of any tribe. This appears to be more expansive than general federal Indian law, which imposes limits on the extent to which tribes can exercise civil legislative jurisdiction over nonmembers. *See, e.g., Montana v. U. S.*, 450 U.S. 544, 565-66 (1981).[16] Expansive legislative jurisdiction over nonmembers implicates, among other things, the State's ability to tax nonmembers.

Civil Adjudicatory Jurisdiction

Civil adjudicatory jurisdiction refers to the types of cases that a Tribe's court is empowered to decide. Under current law, the Tribes' civil adjudicatory jurisdiction is limited to: 1) small claim civil actions arising on the reservation (or Houlton Trust Land) between members of the Penobscot Nation, Passamaquoddy Tribe, and Houlton Band; 2) Indian child custody proceedings under the Indian Child Welfare Act; and 3) family matters (marriage, divorce, support) between members of the Penobscot Nation, Passamaquoddy Tribe, and Houlton Band who reside on the reservation (or Houlton Trust Land). 30 M.R.S. §§ 6209-A(1)(C)-(E), 6209-B(1)(C)-(E), & 6209-C(1)(C)-(E), (1-A)(C)-(E), (1-B)(C)-(E). The courts of the Penobscot Nation and the Passamaquoddy Tribes also have exclusive authority over violations of tribal ordinances committed by a member of either tribe. 30 M.R.S. § 6206(3).

L.D. 2094 significantly expands tribal court jurisdiction to "[c]ivil actions, including domestic relations matters, arising on . . . Tribal Lands to the extent permitted under federal

[16] A well-respective treatise on federal Indian law states: "Tribal legislative jurisdiction over non-Indians or nonmembers within Indian country is complex." *Cohen's Handbook of Federal Indian Law*, §7.02[1][a] at pg. 600 (Neil Jessup Newton ed., 2012).

Indian law." L.D. 2094, §§ 14, 15, 16. Under federal law, a tribe's adjudicatory jurisdiction over nonmembers is generally understood to be limited to "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" and nonmember conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. U. S.*, 450 U.S. 544, 565-66 (1981). The extent of tribal adjudicatory jurisdiction over nonmembers is "ill-defined," and the Supreme Court's "own pronouncements on the issue have pointed in seemingly opposite directions." *Nevada v. Hicks*, 533 U.S. 353, 376 (2001) (Souter, J., concurring). As a result, the adjudicatory authority of tribes under federal Indian law is an area of frequent litigation, particularly with respect to tribal courts' authority over nonmembers. Without clarification in L.D. 2094 regarding the extent of the Tribes' civil adjudicatory authority, similar litigation can be expected here.

Federal Authority to Amend MIA

Consideration should be given to whether L.D. 2094 makes amendments to MIA beyond what has been authorized by Congress. In enacting MICSA, Congress gave advance consent to future amendments to MIA, but there are limits. With respect to the Passamaquoddy Tribe and the Penobscot Nation, amendments must relate to one of the following:

> (A) the enforcement or application of civil, criminal, or regulatory laws of the Passamaquoddy Tribe, the Penobscot Nation, and the State within their respective jurisdictions;
> (B) the allocation or determination of governmental responsibility of the State and the tribe or nation over specified subject matters or specified geographical areas, or both, including provision for concurrent jurisdiction between the State and the tribe or nation; or
> (C) the allocation of jurisdiction between tribal courts and State courts.

Pub. Law 96-420, § 6(e)(1). It appears that most of the amendments L.D. 2094 makes with respect to the Passamaquoddy Tribe and the Penobscot Nation at least arguably fit into one of

these categories. One exception, which will be discussed below, is whether the State is authorized to make amendments relating to the application of federal law.

With respect to the Houlton Band of Maliseet Indians, Congress did not consent to the State making any amendments to MIA but instead only authorized the State and the Band "to execute agreements regarding the jurisdiction of the State of Maine over lands owned by or held in trust for the benefit of the band or its members." Pub. Law 96-420, § 6(e)(1). Thus, the amendments in MIA relating to the Houlton Band might not be authorized by Congress. *But see* 30 M.R.S. §§ 6205-A, 6206-A & 6209-C (reflecting amendments to MIA regarding the Houlton Band).

Application of Federal Law

MICSA has two provisions limiting the application of federal Indian law in Maine. Section 6(h) states:

> Except as otherwise provided in this Act, the laws and regulations of the United States which are generally applicable to Indians, Indian nations, or tribes or bands of Indians or to lands owned by or held in trust for Indians, Indian nations, or tribes or bands of Indians shall be applicable in the State of Maine, except that no law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians, and also (2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State.

P.L. 96-420, § 6(h). Section 16(b) states:

> The provisions of any Federal law enacted after the date of enactment of this Act for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this Act and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

P.L. 96-420, § 16(b). As discussed above, an example of a federal law that does not apply in Maine by virtue of Section 16(b) is IGRA.

L.D. 2094 purports to undo the effects of Section 6(h) and Section 16(b). With respect to Section 6(h), the bill states that

> any law or regulation of the United States that accords a special status or right to, or relates to a special status or right of, any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians applies to the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians and their members and is deemed not to affect or preempt the civil, criminal or regulatory jurisdiction of this State, including, without limitation, laws of this State relating to land use or environmental matters.

L.D. 2094 § 24. With respect to Section 16(b), the bill states:

> the provisions of any federal law enacted after October 10, 1980 for the benefit of Indians, Indian nations or tribes or bands of Indians apply to the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians and their members and is deemed not to affect or preempt the application of the laws of this State, including application of the laws of this State to lands owned by or held in trust for Indians or Indian nations, tribes or bands of Indians, regardless of whether such federal law is specifically made applicable within this State.

Id.

It is not clear whether the Legislature can simply "deem" that all federal laws enacted for the benefit of, or that accord special status or rights to, Indians and Indian tribes do not affect or preempt Maine law. A court may conclude that if a federal law does, in fact, preempt or affect the application of Maine law, it makes no difference whether the Legislature has deemed otherwise. Further, in the event of a conflict between MIA and MICSA, MICSA will control.

Another complication is whether Congress has consented to these amendments to MIA. As discussed above, with respect to the Passamaquoddy Tribe and the Penobscot Nation, Congress has authorized amendments with respect to three specified categories. Amendments relating to the application of federal law do not appear to fit into any of those categories. And, as

also discussed above, Congress has not authorized any amendments to MIA with respect to the Houlton Band.

If the Legislature wishes to make changes regarding the application of federal law, consideration should be given to whether amendments to MICSA are necessary.

Aroostook Band of Micmacs

Although L.D. 2094 does not directly address the Aroostook Band of Micmacs, some of its provisions may affect the Band. A provision in MIA declares:

> Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.

30 M.R.S. § 6204. This provision applies to the Aroostook Band, but it would be repealed by L.D. 2094. It is not clear what impact repeal of this provision would have on the allocation of jurisdiction between the State and the Band.[17]

Conclusion

Changes to MIA on the scale proposed by L.D. 2094 will dramatically alter the longstanding jurisdictional relationship between the States and the Tribes. I do not question the merits of making changes to that relationship, but changes should be made cautiously and deliberately, with careful consideration given to all possible consequences. As noted above, changes cannot easily be undone if they prove problematic, and there may well be many

[17] A settlement act specifically addressing the Aroostook Band – the Micmac Settlement Act – has its own provision declaring that the Band, its members, and its lands and natural resources "shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein." 30 M.R.S. § 7203. There is legal uncertainty regarding the effectiveness of this law. *See Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41 (1st Cir. 2007).

unintended consequences give the breadth of changes being made. My office stands ready to provide further analysis if requested and to provide any other help or assistance with this matter.